No. 87-1097

In the Supreme Court of the United States

October Term, 1987

OTIS R. BOWEN, M.D., Secretary of Health and Human Services,

Petitioner,

v.

GEORGETOWN UNIVERSITY HOSPITAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE RESPONDENTS

MICHAEL F. ANTHONY
LINDA A. TOMASELLI*
JEFFREY M. TESKE
840 North Lake Shore Drive
Chicago, Illinois 60611
(312) 280-6126
Attorneys for Amicus Curiae American Hospital Association
**Counsel of Record*

Of Counsel:

ROBERT A. KLEIN
MARGARET M. MANNING
TIMOTHY P. BLANCHARD
WEISSBURG AND ARONSON, INC.
2049 Century Park East
Los Angeles, California 90067

Petition for Writ of Certiorari Filed December 30, 1987
Petition for Writ of Certiorari Granted February 29, 1988

QUESTION PRESENTED

Whether the Administrative Procedure Act or the Medicare statute permit the Secretary of Health and Human Services to promulgate a legislative rule with retroactive effect.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 87-1097

In the Supreme Court of the United States October Term, 1987

OTIS R. BOWEN, M.D., Secretary of Health and Human Services,

Petitioner,

v.

GEORGETOWN UNIVERSITY HOSPITAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE RESPONDENTS

INTEREST OF THE AMERICAN HOSPITAL ASSOCIATION

Amicus curiae American Hospital Association ("AHA") respectfully submits this brief in support of the Respondents. AHA has obtained the written consent of both Petitioner and Respondents to the filing of this brief *amicus curiae*.

AHA, a not-for-profit membership corporation organized under the laws of the State of Illinois, is the primary organization of hospitals in the United States. Its membership includes approximately 6,000 hospitals and other health care institutions, as well as approximately 45,000 individuals. The principal corporate objective of AHA is to promote high qual-

ity health care and health services for all people by providing leadership and assistance to hospitals and health care organizations in meeting the health care needs of their communities.

The overwhelming majority of AHA's institutional members participate as providers of services in the program of health insurance for the aged and disabled established by Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395ccc (West Supp. 1983 & 1988), known as the Medicare program, and thus are subject to the rules issued to implement the Medicare program. These rules are numerous, and address eligibility of beneficiaries, coverage of services, and payment levels.

Payments made to hospitals on behalf of beneficiaries of the Medicare health insurance program account for approximately 40% of the revenue of most AHA member hospitals. Reimbursement for services furnished to Medicare beneficiaries is, necessarily, a major factor considered by such hospitals in their financial planning, and can affect the continued ability of hospitals to provide needed services to Medicare beneficiaries and others in the community.

Accordingly, AHA and its members have a strong interest in the integrity and reliability of the rulemaking process. In particular, AHA and its members have an immediate and continuing concern regarding sound government policies and procedures affecting the administration of the program, including procedures used to implement changes in the reimbursement rules applicable to Medicare providers.

At issue in this case is an attempt by the Secretary of Health and Human Services ("Secretary") to bypass the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (West 1977) ("APA"), in his administration of the Medicare program.[1] AHA suggests that the Court reject

---

[1] With the advent of the Medicare prospective payment system established by Title VI of the Social Security Amendments of 1983, Pub. L. No. 98-21, §§ 601-607, 97 Stat. 149-172, and applicable to inpatient services of most hospitals, the practical significance of the specific regulation at issue here is somewhat

(Footnote continued on the following page)

the Secretary's argument that his power under the Medicare statute extends to the promulgation of legislative rules with retroactive effect, and adopt the reasoning of the court of appeals, which is in harmony with both the plain language of the APA and the critically important policy considerations underlying it.

SUMMARY OF THE ARGUMENT

Amicus curiae American Hospital Association respectfully submits that the judgment of the United States Court of Appeals for the District of Columbia Circuit rejecting the Secretary's interpretation of the APA and the Medicare statute should be affirmed for the following reasons: First, the plain language of the APA requires that legislative rules promulgated by an agency be given prospective effect only. That language is controlling, absent an explicit grant of authority to the contrary in the agency's enabling statutes. The power sought here by the Secretary, to legislate rules with retroactive effect, is inconsistent with the philosophy and purpose of the APA scheme, which confers the force of law upon those rules which were promulgated pursuant to the rulemaking requirements of the APA. Permitting an agency to avoid those requirements as merely "procedural" would undermine the carefully drawn statutory scheme applicable to most federal administrative agencies and would seriously threaten the integrity of the rulemaking process. Second, the language of the Medicare statute provides no authority, explicit or otherwise, for legislative rulemaking with retroactive effect.

---

1 *(Continued)*
diminished. The issue of whether the Secretary complies with the APA in his rulemaking functions remains of extreme importance to AHA member hospitals.

ARGUMENT

I. THE ADMINISTRATIVE PROCEDURE ACT PROHIBITS LEGISLATIVE RULES WITH RETROACTIVE EFFECT.

A clear understanding of the structure and purpose of the APA is critical to the resolution of the issue before the Court. That structure sought to clarify and codify the long-recognized distinctions between the legislative and judicial functions of administrative agencies, and was described in the House Report accompanying the legislation as follows:

> In stating the essentials of the different forms of administrative proceedings, the bill carefully distinguishes between the so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights or liabilities in particular cases). It provides quite different procedures for the "legislative" and "judicial" functions of administrative agencies. In the "rule making" (that is, "legislative") function it provides that with certain exceptions agencies *must* publish notice and at least permit interested parties to submit their views in writing for agency consideration *before* the issuance of general regulations (sec. 4).

H.R. Rep. No. 1980, 79th Cong., 2d Sess. 251 (1946), [hereinafter *House Report*], *reprinted in* Senate, Administrative Procedure Act Legislative History, Sen. Doc. No. 79-248, 79th Cong., 2d Sess. at 251 (1946) [hereinafter *Legislative History*]. (Emphasis supplied.) By enacting this bill, the Congress intended to lay down "a policy respecting the minimum requirements of fair administrative procedure." S. Rep. No. 752, 79th Cong., 1st Sess. (1946) [hereinafter *Senate Report*], *reprinted in Legislative History, supra*, at 217.

The Secretary asserts that nothing in the APA deprives him of the power to issue, with retroactive effect, legislative

rules pursuant to section 4 of the APA, 5 U.S.C. 553.[2] Brief for the Petitioner at 21-25. That construction of the statute and the Secretary's arguments in support of it blur the fundamental distinction between the legislative rulemaking and adjudication procedures established by the APA. [3]

---

[2] The Secretary states that his predecessor decided to adhere to the APA notice and comment rulemaking requirements in promulgating Medicare reimbursement regulations, waiving the benefit exception of section 553(a)(2) "[a]s a matter of internal policy." Brief for Petitioner at 6 n.3. The Secretary expressly and publicly waived the exception in 1971, however. 36 Fed. Reg. 2532 (1971); *Mason General Hospital v. Secretary of Health and Human Services*, 809 F.2d 1220, 1224 n. 3 (6th Cir. 1987). That action was prompted by a recommendation of the Administrative Conference of the United States. *Humana of South Carolina, Inc. v. California*, 590 F.2d 1070, 1084 & n.3 (D.C. Cir. 1978) (citing Recommendation No. 16 – Elimination of Certain Exemptions from the APA Rulemaking Requirements, 118 U. Pa. L. Rev. 611 (1970)).

[3] The Secretary's discussion of the case law and commentary concerning the issue of "retroactive rulemaking" confuses legislative rulemaking under the APA with adjudication; it also relies on cases decided before the enactment of the APA, cases involving retroactive statutes, and cases involving interpretative rules. *See* Brief for the Petitioner at 21-24. All but a few of these cases can immediately be distinguished. Some involve retroactive statutes; *see, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); some involve adjudication; *see, e.g., Heckler v. Community Health Services of Crawford Co.*, 467 U.S. 51 (1984); *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 142 (1982); *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1 (1974); *Texaco, Inc. v. Department of Energy*, 795 F.2d1021 (Temp. Emer. Ct. Ap. 1986); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (DC. Cir. 1987); *Porter v. Senderowitz*, 158 F.2d 435 (3d Cir. 1946), *cert. denied*, 330 U.S. 848 (1947); some involve licensing or tariffs; *see, e.g., FPC v. Idaho Power Co.*, 344 U.S. 17 (1952); some involve interpretative rules; *see, e.g., Illinois v. Bowen*, 786 F.2d 288, 292-293 (7th Cir. 1986); *Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250*

(Footnote continued on the following page)

A. The Plain Language of the APA Precludes Legislative Rulemaking With Retroactive Effect.

In reviewing statutory interpretations by agencies, the courts first determine whether Congress has spoken directly to the precise question at issue; if the intent of Congress is clear, that is the end of the inquiry, for the courts must give effect to the unambiguously expressed intent of Congress. *NLRB v. United Food and Com'l Wkrs. Union, Local 23*, ___ U.S. ___, 108 S.Ct. 413, 421 (1988) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, & n.9 (1984)). Only if a statute is ambiguous or silent on the issue must a court consider the agency's interpretation. *Id.*[4] That the construction of the APA is left to the courts in the final analysis is made clear in the Senate Report:

---

3 *(Continued)*
(3d Cir. 1978); *National Helium Corp. v. FEA*, 569 F.2d 1137 (Temp. Emer. Ct. App. 1977); and some are decisions predating enactment of the APA; *see, e.g., Addison v. Holly Hill Fruit Products, Inc.* 322 U.S. 607 (1944); *Twin City Milk Producers Ass'n v. McNutt*, 123 F.2d 396 (8th Cir. 1941); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937); *Miller v. United States*, 294 U.S. 435 (1935); *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922); *United States v. Heinszen & Co.*, 206 U.S. 370 (1907). Other cases require only a careful reading to demonstrate that they are inapposite; *see, e.g., National Ass'n of Indep. Television Producers and Distributors v. FCC*, 502 F.2d 249 (2d Cir. 1974) (not true retroactive rulemaking); *General Telephone Co. v. United States*, 449 F.2d 846 (5th Cir. 1971) (rule requiring the discontinuance of certain activity within four years); *Citizens to Save Spencer County v. EPA.*, 600 F.2d 844 (D.C. Cir. 1979) ("ostensibly retroactive effect" only).

[4] If the Court were to consider the agency's interpretation of the statute, the Court also must consider, *inter alia*, whether the agency's technical expertise gives the agency an enhanced under-

(Footnote continued on the following page)

> *Interpretation and Enforcement.* – Except in a few respects, this is not a measure conferring administrative powers but is one laying down definitions and stating limitations. These definitions and limitations must, to be sure, be interpreted and applied by agencies affected by them in the first instance. But the enforcement of the bill, by the indepen dent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis.
>
> It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used. . . .

Senate Report, reprinted in Legislative History, supra, at 217.

The plain language of the statute, as well as the statutory scheme, mandate the conclusion that only adjudicative action may have retroactive effect under the APA. The statutory definitions laid down by Congress in section 2 of the APA, 5 U.S.C. 551, clearly separate the function of, and procedure for, legislative rulemaking and adjudication.

> "Rules" are often called "regulations" or "general regulations." The definition is important because it *determines* whether section 4 rather than section 5 applies to a regulatory operation. The specification of some of the activities that are rule making is included to illustrate and to embrace them in the definition beyond question. "*Rules*" *formally prescribe a course of conduct for the future rather than*

---

4 *(Continued)*
standing of the issues. *Chevron*, 467 U.S. at 864-66. The construction of the APA put forth here by the Secretary is not the result of special expertise in interpreting the APA, and therefore is not entitled to deference in any event. *Bowen v. American Hospital Association*, 476 U.S. 610, 642 n.30 (1986) (deference based on expertise not justified when many agencies promulgate rules under same statute).

pronounce past or existing rights or liabilities.

House Report, reprinted in Legislative History, supra, at 254. (Emphasis supplied.) This formulation of the distinction was repeated by Representative Walter, author of the *House Report,* during consideration of the bill:

> In rule making an agency is not telling someone what his rights or liabilities are for past conduct or present status under existing law. Instead, in rule making the agency is prescribing what the future law shall be so far as it is authorized so to act.

Administrative Procedure Act: Proceedings in the House and Senate From Congressional Record of March 12 and 27, and May 24 and 25, 1946 (1946) [hereinafter *Congressional Record Proceedings], reprinted in Legislative History, supra,* at 355.

As the Attorney General recognized in what the Secretary has characterized as the "authoritative manual on the APA," Brief for the Petitioner at 33, this dichotomy between the two types of administrative functions is the very basis of the APA legislation. *See* U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 14 (1947) [hereinafter *Attorney General's Manual*]. Rulemaking is described in the *Attorney General's Manual* as an action "which regulates the future conduct," and one clearly distinct from adjudication, which concerns "the determination of past and present rights and liabilities." *Id.*

In its first decision addressing the issue, the Court explained the preference for prospective rulemaking under the APA statutory scheme:

> [Because an agency], unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of [its enabling statute]. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

Chenery, 332 U.S. at 202.[5]

The *Chenery* Court also emphasized the avenues open to agencies in determining how to proceed to address an issue:

> In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rules or individual order.

Id. Once that decision is made, however, the nature of the effect is predetermined. If an agency engages in rulemaking, the effect is prospective only. If an agency decides to adjudicate, action with retrospective effect is possible, although only when the balancing tests are satisfied.

The Secretary disagrees. He asserts that the "future effect" language of the definition of rule is used "simply to distinguish rulemaking from adjudication." Brief for the Petitioner at 24. But that is precisely the point: the plain language of the statute reflects the congressional intent that agency action in the form of legislative rules be effective only prospectively. The process of rulemaking is "prescribing what the future law shall be; 'rulemaking' is not telling someone what his rights or liabilities are for past conduct or present law." *Congressional Record Proceedings, reprinted in Legislative History, supra,* at 355.

Finding no authority in the plain language of the statute to support his position, the Secretary relies upon what he characterizes as "explicit statements of legislative intent," Brief for the Petitioner at 33, but which upon close examination prove to be unrelated and unconvincing bits and pieces of legislative history. *See* Brief for the Petitioner at 25-33. One of the key "explicit statements of legislative intent" upon

---

[5] More recently, the Court of Appeals for the Sixth Circuit reaffirmed that the goal of the APA is assuring that new rules be of prospective application only. *Mason General Hospital,* 809 F.2d at 1225.

which the Secretary relies is, in reality, simply the *absence* in the enacted legislation of any reference to "retroactive" rules, which reference had been made in some of the numerous bills and commentaries developed during the eight years of consideration and debate which preceded the passage of the APA. The Secretary states that "Congress's deliberate omission of the reference to retroactive rules is strong, if not dispositive, evidence that it did not intend to bar retroactive rule making in the APA." Brief for the Petitioner at 27.[6]

Contrary to the conclusion drawn by the Secretary, Congress did act to preclude some retroactive rulemaking–that of the legislative type. Some of the early bills to which the Secretary refers included explicit references to banning both retroactive rules *and* retroactive orders, a position that Congress obviously did not adopt. *Hearings Before the Committee on the Judiciary, House of Representatives on the subject of Federal Administrative Procedure*, 79th Cong., 1st Sess. (1945), *reprinted in Legislative History, supra*, at 55. Congress banned retroactive legislative rules, by definition, but permitted orders with retrospective effect.

The Secretary relies on *Bowen v. Galbreath*, ___U.S.___, 108 S.Ct. 892 (1988), to support the proposition that Congressional intent to allow retroactive legislative rulemaking may be inferred from the absence from the enacted APA of a separate section prohibiting such rulemaking. Brief for the Petitioner at 25. In *Galbreath*, this Court concluded that Congress had intentionally omitted from a statute a provision

---

[6] If one were to adopt the Secretary's approach to statutory construction, one would be forced to conclude that Congress's "deliberate omission" from legislation of a proposed Medicare provision which would have given the Secretary the power to make retroactive rules, is "strong, if not dispositive, evidence" that Congress did not intend the Secretary to have such power. *See Tallahassee Memorial Regional Medical Center v. Bowen*, 815 F.2d 1435, 1453 n. 36 (11 Cir. 1987), *cert. denied*, ___U.S.___108 S.Ct. 1573 (1988) (discussing S. 1550, 99th Cong., 1st Sess. 115 (1985)).

which proposed payment of attorney's fees out of benefits provided under the statute. This intent was evidenced by explicit statements from both of the Congressional reports accompanying the legislation, however. *See* ___U.S. at ___, 108 S.Ct. at 894. In fact, the House Report stated that the intent of that statute would be defeated if attorney's fees were paid from withheld benefits. *Id.*

In the present case, despite the fact that he has evidently canvassed the materials thoroughly, the Secretary has not identified any language in the statute or the legislative history which either authorizes retroactive legislative rulemaking or reflects a Congressional decision that no position would be taken.[7]

The Secretary quotes Professor Davis for the general proposition that "[l]ike retroactive statutes, retroactive rules are valid if they are reasonable but are invalid if their retroactivity is unreasonable in the circumstances." 2 K. Davis, *Administrative Law Treatise* § 7:23, at 109 (2d ed. 1979). *See* Brief for the Petitioner at 22. Professor Davis addresses the issue more precisely than the Secretary's quotation suggests, however; he acknowledges the confusion to be found in the case law, and states the "ideal" interpretation of agency power:

> Although the argument is plausible that legislative rules may be retroactive whenever a statute may be, since the fairness or unfairness is the same and judicial ideas of fairness are decisive, rules differ [from statutes] in two main respects - agencies have no powers except those conferred and courts are reluctant to imply power to issue retroactive rules, and courts give greater deference to judgments of legislative bodies than to judgments of agencies. The ideal

---

[7] The informal five-sentence exchange during the House hearings between Representative Wynne and Chairman McFarland, quoted by the Secretary, Brief for Petitioner at 28-29, does not constitute an "explicit statement of legislative intent".

> might be to tolerate retroactive rules only when they are specifically authorized by a statute, but courts' holdings fall well short of that ideal.

2 K. Davis, *Administrative Law Treatise* § 7:23, at 109 (2d ed. 1979). That "ideal" is consistent with both the language of the APA and the philosophy underlying it.

Nor does the language quoted by the Secretary from the *Attorney General's Manual*, *supra*, and the *House Report*, *supra*, support the Secretary's reading of the statute. *See* Brief for the Petitioner at 33-34. Although the *Attorney General's Manual* speaks of "retroactive" rules in the legislative rule context, it is clear from the context of the sentence quoted by the Secretary that the quoted statement refers to as "retroactive" rules effective immediately upon publication, without the 30-day notice period of 5 U.S.C. § 553(c) (West 1977).

> Also, it is clear from the legislative history that for good cause an agency may put a substantive rule into effect immediately; in such event, the requirement of prior publication is altogether absent, and the rule will be come effective upon issuance as to persons with actual notice, and as to others upon filing with the Division of the Federal Register [citations deleted]. Nothing in the Act precludes the issuance of retroactive rules when otherwise legal and accompanied by the finding required by section 4(c).

Attorney General's Manual, *supra*, at 37. Section 4(c), 5 U.S.C. § 553(c), provides the effective date for regulations. Read in context, the cited passages stand only for the proposition that a rule *can* be effective as early as the date it is filed with the Federal Register or the date on which affected parties receive notice, but not before, and not without the justification required by section 4(c).

The Secretary also complains that the respondents misapprehend the scope of an agency's authority on remand, citing *Chenery*, and suggesting that the Secretary is free to engage in legislative rulemaking with retroactive effect to "cure" the

"cure" the procedural defects identified by the district court. Brief for the Petitioner at 15-16. The Court's decision in *Chenery*, however, stands only for the proposition that an agency may use adjudication in carrying out the agency's function of interpretation and applying its rules and regulations.

At issue here is legislative rulemaking, as opposed to adjudicative action. Adjudicative action with retroactive effect is common in the process of interpreting a statute or legislative rules pursuant to hearings and consideration of individual cases; it allows an agency to respond with flexibility to unforeseeable specialized problems as they arise and is necessarily applied retroactively. *Chenery*, 332 U.S. at 202-03.

Recognizing that adjudication frequently involves retroactive effects which, even if permissible on balance, result in harm to those affected, the courts have frequently encouraged agencies to use rulemaking rather than adjudication whenever possible to announce agency policies of general applicability. *See, e.g., NLRB v. Majestic Weaving Co., Inc.*, 355 F.2d 854, 860 (2d Cir. 1966). It is true, as the Court pointed out in *Chenery*, that on remand the agency retains authority to proceed to deal with the issue afresh. 332 U.S. at 200-201. It is also true, however, that on remand the agency confronts the same decision it had originally: to proceed by rulemaking or adjudication.[8] *Chenery* dealt only with adjudication.

The principle that invalidation of a regulation reinstates the prior valid regulation follows necessarily from the nature

---

[8] The *Chenery* analysis recognizes that each type of action is a valid administrative tool and that each has a different purpose. Rulemaking is the proper tool for announcing policies of general applicability, while adjudication is the proper tool for adjusting an agency's interpretation of a rule to particular circumstances. 332 U.S. at 200-01.

of legislative rules as rules of prospective effect. The prior valid regulation simply continues in force until replaced by another *valid* regulation or until overruled by statutory amendment. *See, e.g., Cumberland Medical Center v. Secretary of Health and Human Services*, 781 F.2d 536 (6th Cir. 1986); *Action on Smoking and Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983)

B. Legislative Rules with Retroactive Effect Would Undermine the Procedural Safeguards of the APA.

Generally, "courts are charged with . . . ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979). With respect to substantive policy changes, those minimum procedures include: publishing notice of a proposed rule to advise interested parties of the nature and scope of regulatory action under consideration; allowing interested parties an opportunity to participate in the rulemaking process through submission of written data, views, or arguments; considering relevant comments and materials furnished by the public; and publishing the rules incorporating a concise general statement of the rule's purpose. 5 U.S.C. § 553 (West 1977). Congress established these procedural requirements to benefit both the agency and the regulated entities. *See, e.g., Abington Memorial Hospital v. Heckler*, 576 F. Supp. 1081, 1084-87 (E.D. Pa. 1983), *aff'd*, 750 F.2d 242 (3d Cir. 1984).

The Secretary argues here that, despite his failure to adhere to these requirements in publishing a rule, he can later simply reissue the same rule, retroactive to the date of the invalid rule, to "correct" procedural defects. The Secretary's position "trivializes the procedures mandated by the Administrative Procedure Act." *Mason General Hospital*, 809 F.2d at 1231, and its adoption would threaten the procedural safeguards carefully put in place by Congress.

In the instant case, the court of appeals properly rejected

the Secretary's suggestion that retroactive rulemaking is permissible in order to remedy a procedural defect in a rule, and observed that if the Secretary's position were adopted, agencies would be free to violate the rulemaking requirements with impunity. *Georgetown University Hospital v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987).

Although the Secretary should be permitted to correct procedural defects in regulations, the avenues available for this form of administrative action are legislative rulemaking, which has prospective effect, or adjudication, which can have retroactive effect if justified under the traditional balancing test. *See Retail, Wholesale & Dep't. Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972).

AHA files this brief primarily in response to what it perceives to be a developing pattern on the part of the agency of ignoring APA requirements in the Medicare context. Most notably, the Secretary has attempted, in two recent major cases affecting hospitals throughout the nation, to subvert APA procedures through the use of retroactive rulemaking.

The first instance involves one of the most extensively litigated APA cases in history; in 1979, the Secretary promulgated a legislative rule regarding Medicare reimbursement of malpractice insurance costs. This rule, which drastically changed the method of reimbursement for that category of costs, was promulgated without compliance with notice and comment procedures required under 5 U.S.C. § 553(b)-(d) (West 1977), and was subsequently invalidated in almost

every federal circuit.[9]

After several years of litigation and numerous convincing defeats, the Secretary refused to apply the prior valid rule governing malpractice insurance costs, as would ordinarily be the case when a rule is invalidated.[10] Instead, the Secretary promulgated yet another rule in 1986 and attempted to apply that rule retroactively to 1979.[11]

The second instance, and the subject of this litigation, was the Secretary's attempt in 1984 to repromulgate, with effect retroactive to 1981, a Medicare wage index which he had illegally promulgated in 1981.

In both of these instances, the Secretary is attempting to put himself in a better position than he would have been

---

[9] This issue was litigated in more than 90 federal district court cases and has been addressed by almost all of the federal courts of appeals in the nation. *See Cumberland Medical Center*, 781 F.2d 536; *Bedford County Memorial Hospital v. Health & Human Services*, 769 F.2d 1017 (4th Cir. 1985); *Menorah Medical Center v. Heckler*, 768 F.2d 292 (8th Cir. 1985); *DeSoto General Hospital v. Heckler*, 766 F.2d 182 (5th Cir. 1985); *Lloyd Noland Hospital and Clinic v. Heckler*, 762 F.2d 1561 (11th Cir. 1985); *St. James Hospital v. Heckler*, 760 F.2d 1460 (7th Cir. 1985), *cert. denied*, 474 U.S. 902 (1985); *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579 (10th Cir. 1985), *cert. denied*, 474 U.S. 863 (1985); *Abington Memorial Hospital v. Heckler*, 750 F.2d 242 (3d Cir. 1984), *cert. denied*, 474 U.S. 863 (1985).

[10] *See, e.g., United States v. Baltimore & Ohio Railroad Company*, 284 U.S. 195, 203-04 (1931); *Mason General Hospital*, 809 F.2d at 1223, 1229; *Tallahassee Memorial Regional Medical Center*, 815 F.2d at 1453 n.35, 1455-1456; *Abington Memorial Hospital v. Heckler*, 750 F.2d at 244; *Lloyd Noland Hospital & Clinic v. Heckler*, 762 F.2d at 1569; *Menorah Medical Center*, 768 F.2d 297.

[11] *See Mason General Hospital*, 809 F.2d 1220; *Tallahassee Memorial Regional Medical Center*, 815 F.2d 1435; *Walter O. Boswell Memorial Hospital v. Heckler*, 749 F.2d 788 (D.C. Cir. 1984).

in had he *followed* the APA procedures and legally promulgated the rules. As the court stated in *Tallahassee Regional Memorial Center v. Bowen*:

> Such an approach must be rejected; it would permit the Secretary to benefit from the 1979 rulemaking, even though the hospital successfully attacked the 1979 rule.

815 F.2d at 1455. That court provided a fitting analogy for what the Secretary has characterized as "curative" retroactive rulemaking:

> In football, if a team gains ten yards on a play in which it commits a five yard penalty, the ball is typically taken back to the original line of scrimmage and the five yard penalty is counted off from there. Adopting the Secretary's approach would be like taking five yards off from the point where the play ended (and thus allowing the team a net five yard gain on a play in which it committed an infraction).

815 F.2d at 1455 n.41.

Hospitals are complex organizations. In order to be run effectively, they must be given fair notice of new rules and procedures so that they may adjust their operations. If the Secretary is permitted to apply new rules retroactively, and effectively give hospitals one-day notice of significant changes in reimbursement, for example, the fiscal planning hospitals have undertaken in reliance on prior rules will be thwarted. This type of retroactive rulemaking "interferes with the legally-induced and settled expectations of [the hospitals]." *Daughters of Miriam Center*, 590 F.2d at 1260.

By contrast, if the Secretary were consistently required to follow APA rulemaking procedures from the beginning, and not permitted to "correct" invalid rules retroactively, hospitals and other regulated persons and institutions would have a clear set of rules and policies to follow, and not be forced to make budget and internal policy decisions based upon speculation and guesswork.

In addition to the adverse practical consequences of the

Secretary's failure to comply with the APA, it is possible to envision further negative effects. As the malpractice cases demonstrate, retroactive rulemaking can be used to prevent judicial review of agency regulations, and can be used to moot a case after years of litigation. The court in *Tallahassee* noted two potential abuses in this respect:

> First, [allowing retroactive rulemaking] would be creating a situation in which an agency, if it were inclined, could avoid review of an agency action and potentially abuse the review process. The ability to moot a case by replacing a challenged regulation with a similar rule after years of litigation could be abused. Second, the ability of an agency to moot a case at will could lead to enormous waste of judicial resources.

815 F.2d at 1452. The *Tallahassee* court further warned:

> While not intending to question the Secretary's good intentions, we cannot condone a regulation aimed specifically at on-going litigations, where the regulation has the effect of preventing the courts from awarding the full relief sought by the parties and already obtained by other hospitals in similar litigation such as *Lloyd Noland*. To permit such a regulation could effectively insulate the Secretary from review by giving him the power to short circuit a case after years of litigation and require the plaintiff parties to start the entire administrative and judicial review process all over again. As discussed above, the Secretary has acknowledged the possibility that, after a future challenge to the 1986 regulation had partially progressed through the courts, he could promulgate yet another regulation to defuse the challenge to the 1986 rule. Such a power could be used to abuse seriously the litigation process.

Tallahassee, 815 F.2d at 1456.

In *Mason General Hospital*, the court also recognized that granting the Secretary unlimited authority for retroactive correction would "result in the Secretary's ability to repromulgate successive corrective rules with retroactive

application to the date of the initial invalidated rule should subsequent attempts at rulemaking likewise be invalidated." 809 F.2d at 1225. Carried to its logical extreme, the Secretary could continue to promulgate "curative" rules, thereby effectively depriving the litigants of their rights.

The problems resulting from the agency's flouting of APA requirements cannot effectively be resolved through litigation, as the malpractice rule cases discussed above demonstrate. The Secretary had adopted a policy of "nonacquiescence" in final court decisions which reject his policies or reverse his actions. Several courts have noted this policy with disapproval. For example, in *Hillhouse v. Harris*, 715 F.2d 428 (8th Cir. 1983), the court stated:

> We note the Secretary continues to operate under the belief that she is not bound by district or circuit court decisions.

Id. at 430. *See also, id.* (McMillian, Circuit Judge, concurring specially) (possibility of contempt proceedings against the Secretary).

Similarly, in *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983), Judge Pregerson stated:

> The Secretary's nonacquiescence [in our rulings] not only scoffs at the law of this circuit, but flouts some very important principles basic to our American system of government – the rule of law, the doctrine of separation of powers embedded in the constitution, and the tenet of judicial supremacy laid down in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). The government expects its citizens to abide by the law – no less is expected of those charged with the duty to faithfully administer the law.

713 F.2d at 1441 (Pregerson, J., concurring).

Again, in *Murray v. Heckler*, 722 F.2d 499 (9th Cir. 1983), the court began its opinion by observing, "[t]his case is one of many before this court as a result of the Secretary's refusal to follow this circuit's ruling in *Patti v. Schweiker*,

669 F.2d 582 (9th Cir. 1982), that disability benefits cannot be terminated without evidence of improvement." *Id.* 722 F.2d at 499. The court further stated: "We fault the Secretary not only for flouting the law of this circuit, but for failing to follow her own guidelines." *Id.* at 502.

Thus, even when the Secretary has been defeated repeatedly and resoundingly in litigation challenging his failure to comply with the procedural or substantive requirements of the APA, he continues to litigate cases which have virtually identical facts, forcing his opponents to expend substantial time and energy to vindicate their rights. *See, e.g., Stormont-Vail Regional Medical Center v. Bowen*, 645 F. Supp. 1182 (D.D.C. 1986).

Another closely related problem with the promulgation of retroactive rules is determining the scope of the permissible period of retroactivity: how far can retroactivity apply[12]

The *Tallahassee* court recognized that the Secretary's interpretation would permit him power to make retroactive changes "presumably back to the inception of the Medicare program in 1966." *Tallahassee*, 815 F.2d at 1453 n.36. As the Court in *Mason General Hospital* noted, this unlimited authority would

> [vest the Secretary] with the power not only to determine the appropriate change in the reimbursement formula, but the permissible period of retroactive application as well. Adoption of the construction urged by the Secretary would result in his ability to use unfettered discretion in enacting regulations

[12] Even under the Secretary's formulation, Brief for the Petitioner at 44 n.38, retroactive rules can be applied to any "open" cost reports. Because cost reports under appeal in litigation are" open," hospitals that have been litigating the malpractice rule issue since 1979 have nine successive "open" cost reports subject to retroactive application of any new rules the Secretary chooses to promulgate. This result is simply unacceptable on practical and equitable grounds.

> that give retroactive effect to any or every change that is made in the formulas for determining reimbursable costs.

809 F.2d at 1225. The court added that "it would fly in the face of settled principles of judicial review to permit an agency to be the sole determiner of the retroactive effect of its own pronouncements, particularly those governed by the safeguards of prospectivity embodied in the APA." *Id.* at 1226.

Finally, if the Secretary is allowed to "cure," retroactively, rules promulgated without proper notice and comment procedures, it is possible that flexibility in rulemaking will be lost. In *National Tour Brokers Ass'n. v. United States*, 591 F.2d 896 (D.C. Cir. 1978), the court observed that when proper prior notice and comment procedures are not followed, an agency might lose its "flexible and open-minded attitude towards its own rules . . . [because] the agency had already put its credibility on the line in the form of 'final' rules." *Id.* at 902. The court further noted that "[p]eople naturally tend to be more closed-minded and defensive once they have made a 'final' determination." *Id.* (footnote omitted).

The examples discussed above reflect a trend about which AHA and its member hospitals are justifiably concerned – the Secretary's seeming disregard for proper APA rulemaking procedures and the adverse consequences for beneficiaries and providers of services. In a similar case, the Court of Appeals for the District of Columbia Circuit held:

> We agree that "'the Commission's broad responsibilities . . . demand a generous construction of its statutory authority,'" but we do not believe the Commission should have authority to play fast and loose with its own regulations.

Panhandle Eastern Pipe Line Co. v. FERC, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (footnotes omitted).

The difficult problems posed by "curative" retroactive rulemaking can be prevented. The best preventive measure against these potential abuses, and that adopted by Congress,

is to give force to the prohibition against legislative retroactive rulemaking embodied in the APA.

II. THE MEDICARE STATUTE DOES NOT PROVIDE AN EXCEPTION TO THE ADMINISTRATIVE PROCEDURE ACT'S BAN ON LEGISLATIVE RULES WITH RETROACTIVE EFFECT.

The APA makes clear that exceptions to its principles, such as the power to issue retroactive legislative rules, are not to be implied:

> No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.

APA § 12 (1946), *reprinted in Legislative History, supra*, at 9. The spirit of that provision is expressed in the analysis of the Senate bill provided to Congress by the Attorney General:

> [T]he act is intended to express general standards of wide applicability. It is believed that the courts should as a rule of construction interpret the act as applicable on a broad basis, *unless some subsequent act clearly provides to the contrary.*

Senate Report, Appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945, *supra, reprinted in Legislative History, supra*, at 231. (Emphasis supplied.) The Attorney General's views on section 12 were mirrored by the bill's sponsors in the hearings on the proposed legislation. *See Congressional Record Proceedings, supra, reprinted in Legislative History, supra*, at 371, 414.

On occasion, Congress has provided specific authority to apply legislative rules retroactively when it deemed such power appropriate. *See, e.g.*, 26 U.S.C. § 7805 (West 1976), which explicitly gives the Secretary of Treasury discretionary authority to apply rules retroactively. No such authority has been included in the Medicare statute.

The Secretary argued below, and maintains here, that 42 U.S.C. § 1395x(v)(1)(A)(ii) empowers him to issue legislative

rules with retroactive effect. Section 1395x(v)(1)(A) provides in relevant part:

> The reasonable cost of any services shall be . . . determined in accordance with regulations establishing the method or methods to be used, and the items to be included in determining [reasonable] costs.
>
> * * *
>
> *Such regulations shall . . . provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period*, the aggregate reimbursement produced by the methods of determining costs proves to be *either inadequate or excessive.*

42 U.S.C. § 1395x(v)(1)(A)(i),(ii) (West 1983) (emphasis supplied). The Secretary claims that the statutory language "admits" of his construction, and therefore it must be upheld by the Court. Brief for the Petitioner at 42.

As discussed, *supra*, however, the threshold question to be addressed is whether Congress has directly spoken to the issue. If the intent of Congress is clear, both the courts and the agency must give effect to that intent. *Young v. Community Nutrition Institute*, 476 U.S. 974, 980, (1986) (citing *Chevron*, 467 U.S. at 842-844 note-should be).

What the plain language of 42 U.S.C.§ 1395x(v)(1)(A)(ii) requires of the Secretary is that he provide, through legislative regulations, a *mechanism* for the individual, case-by-case consideration, *i.e.*, adjudication, of aggregate reimbursement produced by the methods formulated by the Secretary for the reimbursement of costs by the Medicare program.

The court in *Regents of University of California v. Heckler*, 771 F.2d 1182 (9th Cir. 1985), considered a hospital's demand for case-by-case adjustments and found that the "plain language" of section 1395x(v)(1)(A)(ii) required such adjustments. *Id.* at 1189-90. *Accord, St. Paul-Ramsey Medical Center v. Bowen*, 816 F.2d 417, 420 (8th Cir. 1987). *See also Medical Center Hospital*, 839 F.2d at 1511 (specifically

rejecting the Secretary's argument that "retroactive corrective adjustments" pursuant to section 1395x(v)(1)(A)(ii) are to be made on a "systemic," not individual, basis).

As the court in *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663 (2d Cir. 1973), observed:

> Although we have uncovered no legislative history to elucidate this statutory language, its plain words do not require interpretative gymnastics. Where a"method of determining costs . . . produces an inaccurate reimbursement . . . Congress has instructed the Secretary to issue regulations providing for a "retroactive corrective adjustment."

Id. at 669. In *Kingsbrook*, the court clearly thought that regulations establishing a *process* for corrective adjustment were required.

The Secretary is unwilling to concede that the language of the statute plainly or unambiguously contradicts his position, and insists that his construction be upheld based on deference to his view of the most "sensible" approach to administration of the program.

Deference to an agency interpretation, however, is appropriate only when the agency is interpreting its own statute in a technical or complex area. The statutory construction issues before the Court do not require the application of the agency's health care expertise; rather, they are purely questions of law. *See Bowen v. American Hospital Association*, 476 U.S. at 642 n.30; *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-73 (1986). More important, in this case, in determining what deference, if any, to afford, the courts also consider the consistency with which an agency interpretation has been applied, and whether the interpretation was contemporaneous with the enactment of the statute being construed. *NLRB v. United Food and Com'l Workers Union, Local 23*, ___U.S. at ___, 108 S.Ct. at 421 n.20; *INS v. Cardoza-Fonseca*, 480 U.S. ___, ___, and n.30, 107 S.Ct. 1207, 1221, n.30 (1987); *Bowen v. American Hospital Association*, 476 U.S. at 646, n.34 (fact that the agency interpretation has

been neither consistent nor longstanding substantially diminishes the deference to be given).

The conclusion that the interpretation of the scope and meaning of section 1395x(v)(1)(A)(ii) developed by the Secretary in this litigation is a new and opportunistic one is supported by a review of several prior inconsistent interpretations put forth by the Secretary since the enactment of the Medicare statute.

In *Kingsbrook*, the Secretary took the position that the "retroactive corrective adjustment" envisioned by section 1395x(v)(1)(A)(ii) is the end-of-year reconciliation of interim payments against the amount deemed due the provider, found in 20 C.F.R. 405.454 (1972) (*recodified at* 42 C.F.R. 413.64 (1987).[13] 486 F.2d at 669. The Secretary made the same argument eleven years later in *Regents of University of California*, 771 F.2d at 1189.

Yet, the Secretary *has* issued regulations which establish a case-by-case corrections process and which appear to implement the "retroactive corrective adjustment" authority.[14] Those regulations create the process of "reopening" reimbursement determinations. *See* 42 C.F.R. §

---

[13] This view is supported to some extent by testimony made by the Commissioner of Social Security, Robert Ball, at hearings on the Medicare reimbursement regulations. This reconciliation process is independently authorized by 42 U.S.C. § 1395g, however. Thus, this interpretation would render the language of section 1395x(v)(1)(A)(ii) surplusage.

[14] The District Court in *Athens Community Hospital, Inc. v. Schweiker*, 514 F. Supp. 1336, 1338 n.5 (D.D.C. 1981), *rev'd on other grounds*, 686 F.2d 989 (D.C. Cir. 1982), surveyed the statutory and regulatory scheme and concluded that the reopening regulations are the *only* regulations addressing retroactive corrections. Moreover, this Court has apparently recognized the relationship between 42 U.S.C. § 1395x(v)(1)(A)(ii) and 42 C.F.R. § 405.1885. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 54 (1984).

405.1885-1889 (1987). These regulations, which cite 42 U.S.C. § 1395x(v) as well as 42 U.S.C. §§ 1395hh and 1395oo as their statutory authority, *see* 39 Fed. Reg. 35414 (Sept. 26, 1974), reflect one of the Secretary's earliest interpretations of the scope of section 1395x(v)(1)(A)(ii). They establish a process to correct either underreimbursement *or* overreimbursement.

In fact, the Secretary has taken the position that the proper regulatory implementation of 42 U.S.C. § 1395x(v)(l)(A)(ii) is 42 C.F.R. 405.1885, the reopening regulation. At the Court of Appeals for the Seventh Circuit, the Secretary argued that he "was reasonable in construing 'retroactive corrective adjustment' to imply reopening," *i.e.*, the process set forth in 42 C.F.R. § 405.1885. Reply Brief for Appellant at 22-23, *St. James Hospital v. Heckler*, 760 F.2d 1460 (7th Cir. 1985) (No. 84-1478). The same connection between section 1395x(v)(1)(A)(ii) and 42 C.F.R. § 405.1885 was made by the Secretary in a brief filed with the Court of Appeals for the Tenth Circuit. Brief for Appellee at 46, *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579 (10th Cir. 1985) (No. 83-2417).

Only recently has the Secretary argued that "retroactive corrective adjustments" pursuant to section 1395x(v)(1)(A)(ii) must be made on a systemic basis. *Medical Center Hospital*, 839 F.2d at 1511. Yet, the Secretary was "apparently unwilling to concede that he has *ever* interpreted the 'retroactive corrective adjustments' provision to require provider-specific adjustments." *Id.* at 1513 n.14. As that court noted, however, not only does the "plain language" of the statute require such adjustments, but such adjustments have been made available in the past on a provider-specific basis. *Id.*

The Secretary's varying interpretations appear to constitute "agency waffling without explanation," and should not be taken as authoritative. *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987). Perhaps the only conclusion to be drawn from the confusion in this area is that it is, in large part, the Secretary's doing.

The conclusion that section 1395x(v)(1)(A)(ii) does not authorize retroactive changes in methods or principles of reimbursement, but simply requires an adjudicatory process, however, is consistent with the language of the statute and with the philosophy set forth in the testimony of Robert Ball, then the Commissioner of Social Security, who testified at hearings on the original Medicare reimbursement regulations that retroactive changes in reimbursement principles were not contemplated:

> *[W]e don't retroactively change the principles. . . .*
>
> * * *
>
> *I don't think that the retroactive provision contemplates going back over the year and changing the principles.* I think what is contemplated is that you pay first on the basis of advances, that is estimates not advances an estimate. . . . *It would hardly seem reasonable at the end of the year*, after hospitals had entered into an agreement with you on the basis of certain principles, *to shift all the principles for retroactive settlement in terms of how you compute a cost.* I don't think that was contemplated at all.

Reimbursement Guidelines For Medicare: Hearing before the Committee on Finance, United States Senate, 89th Cong., 2d Sess. (1966) at 56, 119. (Emphasis supplied.)

Commissioner Ball's testimony, while not determinative, is consistent both with the language of the statute and with the notions of equity and practicality that ought to be factors in the administration of the Medicare program

For these reasons, the Court should conclude that the Medicare statute does not authorize retroactive legislative rulemaking.

CONCLUSION

For the reasons set forth above, AHA respectfully submits that the decision of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL F. ANTHONY
LINDA A. TOMASELLI*
JEFFREY M. TESKE
840 North Lake Shore Drive
Chicago, Illinois 60611
(312) 280-6126
Attorneys for Amicus Curiae
American Hospital Association
**Counsel of Record*

Of Counsel:

ROBERT A. KLEIN
MARGARET M. MANNING
TIMOTHY P. BLANCHARD
WEISSBURG AND ARONSON, INC.
2049 Century Park East
Los Angeles, California 90067
(213) 277-2223

June 27, 1988